



APPROVED MINUTES
CITY OF SCOTTSDALE
CHARTER REVIEW TASK FORCE

MONDAY, NOVEMBER 2, 2009

CITY HALL KIVA
3939 N. DRINKWATER BOULEVARD
SCOTTSDALE, AZ 85251

PRESENT: Steven J. Twist, Chair
Susan Bitter Smith
Jim Derouin
Cindi Eberhardt
Alan Kaufman
Charlie Smith
Lisa Johnson Stone was absent

STAFF: Carolyn Jagger, City Clerk
Sherry Scott, Deputy City Attorney
Brent Stockwell, Senior Advisor

Call to Order/Roll Call

Chairman Twist called the Charter Review Task Force regular meeting to order at 5:02 P.M. Roll call confirmed the presence of Task Force members as noted.

Chairman Twist clarified the order of the agenda items and the documents that will be used for discussion.

1. Public Comment

Mr. Ray Torres, from the ORANGE Coalition, stated that the proactive, not reactive, theme he heard from the October 27 Council meeting was refreshing. He feels that establishing a subcommittee on Economic Development shows that the Council sees a long-range need for a systematic approach to overall economic development. He has listened to the Charter Review Task Force's proactive dialogue, as they seriously consider incorporating language from the ORANGE Coalition into the City's Charter. He urged the Task Force to make the language part of the Charter to eliminate changes to

policy by changing councils. Mr. Torres said the ORANGE Coalition is mindful and sensitive about the amount of information it has presented to the Task Force because they are about advocacy and education, and not about lobbying. Mr. Torres introduced Jay Dushoff, an attorney and friend of the ORANGE Coalition.

Mr. Jay Dushoff distributed a one-page handout to the members. Mr. Dushoff referenced rarely-cited State Statutes (12-1116, subparagraphs A and C), and explained the implications of each. Mr. Dushoff then referenced the City's Charter, Article 3A, which speaks to the powers of the City and purports to give the City open-ended power to condemn outside the City limits. Mr. Dushoff believes the Task Force should consider how State Statute 9-511 limits the City's power. Mr. Dushoff explained that the City's Charter calls for 20 days, and the State regulation and the ORANGE Coalition call for 60 days. Mr. Dushoff said if the City is going to have more stringent law, the requirement should be 60 days, rather than 20, and consistent with the language in ARS 12-1116A.

Chairman Twist asked Mr. Dushoff if it was his view that the City has the power to amend its Charter to include principals of use of eminent domain that are more stringent than State law. Mr. Dushoff replied that he believed so and explained his logic.

Charlie Smith asked if State Statute 9-511 prohibits the City from purchasing at fair market value small parcels of land and assembling them for later sale and development. Mr. Dushoff replied that he believes the statute defines blight and cites it as triggering the right of eminent domain, therefore, small parcels that are not being used in their highest and best use could be assembled by the City.

Chairman Twist thanked the speakers for their comments and addressed the possible recommendations for amendments to Article 1, relating to condemnation and waivers of claims for diminution of value (Prop. 207 waivers). Chairman Twist asked Alan Kaufman to present his report to the Task Force.

On behalf of the Task Force members, Alan Kaufman thanked the ORANGE Coalition, the Goldwater Institute, the Institute for Justice, and all of the other interested parties that have appeared before the Task Force to submit comments over the past two months. Mr. Kaufman said the comments have been weighty, extremely provocative, useful, and very important. Mr. Kaufman stated that the Task Force is being given an appellate education on condemnation law and constitutional eminent domain criterion.

Mr. Kaufman noted that the opinions that have been expressed are diverse, but that he has come to a slightly different conclusion. He believes the Task Force does not need to put language in the Charter that goes beyond the State and Federal constitution. Instead, Mr. Kaufman recommended what Mr. Dushoff inadvertently suggested: rather than put language in the Charter, he believes the issue can be addressed in ordinances and statutes passed by the City Council. Mr. Kaufman spoke of the 40-50 cases of condemnation over the Preserve, and explained that the abuses that occur on the federal level have not applied to Scottsdale. Therefore, we should not go into the painstaking scrutiny and decision-making that appellate lawyers regularly disagree about the language in the Charter. Mr. Kaufman said it makes sense to do what is on the Task Force's handout, which was assembled over the past three meetings. Mr. Kaufman stated that this language does not have the detail that the ORANGE Coalition and Goldwater Institution has asked the Task Force to adopt in the Charter, but it does set out a broad framework for some of the criterion they have been asked to address.

Mr. Kaufman reviewed the proposed language on page two of the packet. Mr. Kaufman read the proposed provisions in Section A, and stated that this body is recommending to the Council to restrict eminent domain to these defined circumstances: land use laws, which reduce private property rights, shall further comply with all Arizona laws relating to diminution in value and just compensation thereof. Mr. Kaufman stated that this language sweeps in all Arizona laws, including Prop 207, without going into detail that otherwise belongs in ordinances and statutes. Mr. Kaufman explained that this is why we have thousands of statutes and ordinances. Mr. Kaufman pointed out that the second section addresses Prop 207, which was adopted in 2006 and restricts government's ability to take private property. Mr. Kaufman added that it also addresses when governments can ask people to waive those rights. What this body is proposing to recommend in our Charter is what some of those circumstances are, based on abuses that have happened earlier.

Mr. Kaufman thanked Jim Derouin and Chairman Twist for their work on this, and explained that the intention is to divide the City's actions into two types: administrative (clerical, with very little discretion about when the City can ask for a waiver of citizens' Prop 207 rights), and legislative (rezoning issues, etc. that would allow the City discretion to ask for a waiver of Prop 207 rights). Mr. Kaufman explained that dividing the language into these two types (administrative and legislative), and specifying that the City cannot exert duress to make a landowner sign one of these Prop 207 waivers, was as far as they wanted to take it. Mr. Kaufman concluded by stating that the final decision was that this issue belongs in local ordinance, not in the City's Charter. Chairman Twist thanked Mr. Kaufman for his report and research.

There was further discussion and clarification on eminent domain and condemnation language and issues.

MOTION AND VOTE:

JIM DEROUIN MOVED THAT THE LANGUAGE IN ARTICLE 1, SECTION 3, SUBSECTIONS A & O BE APPROVED TO READ AS FOLLOWS:

A. THE CITY MAY ACQUIRE PROPERTY WITHIN OR WITHOUT ITS CORPORATE LIMITS FOR ANY CITY PURPOSE, CONSISTENT WITH STATE LAW, IN FEE SIMPLE OR ANY LESSER INTEREST OR ESTATE, BY PURCHASE, GIFT, DEVISE, LEASE OR CONDEMNATION, AND MAY SELL, LEASE, MORTGAGE, HOLD, MANAGE AND CONTROL SUCH PROPERTY AS ITS INTERESTS MAY REQUIRE.

CONDEMNATION MAY BE EXERCISED ONLY IF IT IS AUTHORIZED BY THIS STATE, IF IT IS FOR A PUBLIC USE, IF THE CITY HAS EXHAUSTED ALL REASONABLE OPTIONS TO AVOID THE USE OF CONDEMNATION, INCLUDING THE NEGOTIATION OF JUST COMPENSATION, AND IF ITS USE IS NARROWLY EXERCISED TO ADVANCE THE PUBLIC USE THE CITY CONTEMPLATES FOR THE PROPERTY TO BE ACQUIRED. LAND USE LAWS WHICH REDUCE PRIVATE PROPERTY RIGHTS SHALL FURTHER COMPLY WITH ALL ARIZONA LAWS RELATING TO DIMINUTION IN VALUE AND JUST COMPENSATION THEREOF.

O. THE CITY SHALL BE PROHIBITED FROM REQUESTING OR RECEIVING WAIVERS OF CLAIMS FOR DIMINUTION IN VALUE AND/OR COVENANTS NOT TO SUE FOR DIMINUTION IN VALUE, OR THE EQUIVALENT THEREOF, IN ADVANCE OF PROCESSING OR APPROVING ADMINISTRATIVE LAND USE APPLICATIONS,

INCLUDING, BUT NOT LIMITED TO, REQUESTS FOR PLAN REVIEW, DEVELOPMENT REVIEW BOARD APPROVAL, SUBDIVISION PLAT APPROVAL AND CONDITIONAL USE PERMITS. THE CITY MAY REQUEST, RECEIVE AND CONSIDER WAIVERS OF CLAIMS FOR DIMINUTION IN VALUE AND/OR COVENANTS NOT TO SUE, OR THE EQUIVALENT THEREOF, BEFORE MAKING A DECISION ON LEGISLATIVE LAND USE APPLICATIONS THAT ARE INITIATED BY THE LANDOWNER OR ON ITS BEHALF WITH AUTHORIZATION, INCLUDING BUT NOT LIMITED TO, REQUESTS FOR ZONING CHANGES AND REQUESTS FOR ABANDONMENTS, BUT SHALL NOT REQUIRE THAT SUCH WAIVERS BE FILED BEFORE PROCESSING THOSE APPLICATIONS. NO COVENANT NOT TO SUE OR ADVANCE WAIVER OF CLAIMS UNDER PROPOSITION 207 (A.R.S. § 12-1134), OR THE EQUIVALENT, SHALL BE VALID OR ENFORCEABLE UNLESS THAT WAIVER OR COVENANT WAS FREELY, KNOWINGLY AND VOLUNTARILY GIVEN WITHOUT IMPROPER DURESS EXERTED BY AND ATTRIBUTABLE TO THE CITY.

EXCEPT AS PROHIBITED BY THE CONSTITUTION OF THIS STATE, OR RESTRICTED BY THIS CHARTER OR THE LAWS OF THIS STATE PREEMPTING THE CHARTER, THE CITY SHALL AND MAY EXERCISE ALL MUNICIPAL POWERS, FUNCTIONS, RIGHTS, PRIVILEGES AND IMMUNITIES OF EVERY NAME AND NATURE WHATSOEVER."

ALAN KAUFMAN SECONDED. MOTION PASSED 6-0.

Charlie Smith stated after the vote that he was not in support of the changes to Subsection O and explained his reasons. Mr. Smith does not like the "no waiver at all" language, and he believes the administrative action works to the detriment of adjacent property owners and puts an unknown potential claim on the City. Mr. Smith is concerned about the implications of the word duress or improper duress as the rezoning process is usually a very confrontational process. Mr. Smith concluded by stating that these are the reasons he would have voted against paragraph O.

Chairman Twist asked that Mr. Smith's views be recorded in the minutes and included as a minority view when these proposals are submitted to Council.

Brent Stockwell reported that staff has put all of the language that has been approved to date by the Task Force into one document, which will be placed on the website for reference. Mr. Stockwell believes it will be helpful to look at Article 1 as a whole, given the changes that have been made so far.

2. Discussion and possible action regarding recommendations to the City Council regarding possible amendments to the Scottsdale City Charter

Article 1 - Incorporation, Form of Government, Powers and Boundaries

Article 2 - The Council; Article 3 - City Manager; Article 4 – Administrative departments and offices; Article 11 – City Court

There was extensive discussion on the possible recommendations for amendments to Article 2, including, but not limited to, Section 9, relating to Council being the judge of the qualifications of its members, and Section 16, relating to consideration of petitions. The Task Force suggested urging the Council to adopt an ordinance that will describe a process for addressing unethical conduct by council members.

MOTION AND VOTE:

SUSAN BITTER SMITH MOVED THAT ARTICLE 2, SECTION 9, BE AMENDED TO READ AS FOLLOWS:

"THE COUNCIL, AS PROVIDED BY ORDINANCE, SHALL BE THE JUDGE OF THE ELECTION AND THE QUALIFICATIONS, PURSUANT TO SECTION 4, OF ITS MEMBERS AND FOR SUCH PURPOSE SHALL HAVE POWER TO SUBPOENA WITNESSES AND REQUIRE THE PRODUCTION OF RECORDS, BUT THE DECISION OF THE COUNCIL IN ANY SUCH CASE SHALL BE SUBJECT TO REVIEW BY THE COURTS."

CHARLIE SMITH SECONDED. MOTION PASSED 6-0.

Jim Derouin said he would work with staff to look at the code of ethical conduct and see if further recommendations should be considered to Article 2, Section 4 –Qualifications, and present them at the next meeting of the Task Force.

Chairman Twist addressed Article 2, section 16 – Consideration of Petitions

Chairman Twist asked the Task Force to review the proposed amendments from staff and the power of the petition.

Cindi Eberhardt thanked the staff for putting the information on petitions together, noting that it was very helpful. Ms. Eberhardt believes in the power of our citizens to bring issues forward to Council. She described how people bring petitions forward and provided history of Council petitions in Scottsdale. Ms. Eberhardt asked if the Task Force would consider requiring a body of petitions or some sort of threshold for accepting petitions, because the matrix indicates that single petitioners appear to get no action.

Chairman Twist stated that, although he is sympathetic with Ms. Eberhardt's comments from an efficiency standpoint, he is loathe to erect any barriers to any individual citizen who wants to petition the City for a redress of grievances. Chairman Twist said this opportunity is literally protected by the first amendment. Chairman Twist asked the members and staff if they thought there seemed to be a history of submitting the same item over and over again, stating he would be unsympathetic to petitions the Council had addressed at previous meetings.

There was further discussion on how the council addresses petitions and the timeframes and methods of agendaizing them. Additionally, there was further discussion on what acted upon means.

MOTION:

JIM DEROUIN MOVED TO CHANGE ARTICLE 2, SECTION 16 CHANGING THE WORD "ACTED" TO "VOTED," STRIKING "THIRTY (30)" AND ADDING "SIXTY (60)." ALAN KAUFMAN SECONDED.

There was further discussion to clarify when this issue would be addressed and some of the language that is being reviewed.

VOTE:

MOTION PASSED 6-0.

The Task Force agreed to discuss the issue of multiple petitions on the same subject at a later date.

There was discussion on possible recommendations for amendments to Articles relating to appointees of the City Council, including, but not limited to, Article 2, Section 20, relating to the internal (city) auditor; Article 3, the city manager; Article 4, the city clerk, city treasurer and city attorney; and Article 11, relating to the city judge, and related matters.

Brent Stockwell gave an overview of the information that was contained in this week's agenda packet. Chairman Twist thanked staff for the work that went into presentation.

Chairman Twist urged members of the Task Force to do two things: 1) study the materials and points of view thoroughly, so that it will be possible to move through their healthy agenda with some deliberation, and 2) get any proposed amendment changes to Brent Stockwell by Wed., Nov. 14, so there is sufficient time for their proposals to be distributed to and considered by all members of the Task Force.

Mr. Dick Bowers, Former City Manager of Scottsdale, referred to Sections 3 and 17 of the City's Charter, as well as Ordinance 3876, which is scheduled to be ratified by the Council at the following evening's Council meeting. Mr. Bowers believes the Council is torturing an answer out of the Charter. He believes that no city manager can function effectively without the opportunity to bring forward a budget and carry it out. Mr. Bowers stated that this is only done in relationship to the staff you are privileged to lead and through your ability to lead them. He feels that passage of this new ordinance is taking the citizens' intention to have a balance of power in their government and shifting it inappropriately and does the citizens a disservice. Mr. Bowers encouraged the Task Force to really consider and work to understand the balance of power issue, which he stated is critical to the wellbeing of the community. Mr. Bowers explained that when you make political appointees, you put their careers in jeopardy. Mr. Bowers concluded by stating that for four decades, the City Treasurer was also the head of the Management Services Department at the City. He does not think \$100,000 should be spent and the Charter tortured to change that history. Mr. Bowers also encouraged the Task Force not to reference the code of ethics in the City's Charter because Sections 4 and 9 are already a nightmare to administer, and this will further complicate it.

Cindi Eberhardt asked Mr. Bowers to explain how the Treasurer position operated under his management of the City. Mr. Bowers explained that the City Treasurer, Jim Jenkins, was responsible for managing the staff of Management Services and for serving the Council as its Treasurer. Mr. Bowers stated that they managed quite well. Mr. Jenkins would create the budget in concert with the city manager for resource allocation considerations, but was also guided by the Council retreat and Council's input on key areas. Mr. Jenkins had the final responsibility as the City Treasurer to agree to the budget and work out differences with the city manager. Mr. Bowers explained that they

worked issues out when they needed to, and together brought forward a budget to the City Council. That was the extent of their responsibility. Then, the policy body would look at the budget and make changes as they saw fit. The Council would ultimately adopt the policy, at which point the city manager became appropriately obligated to use the resources at his disposal to get the work of the budget done. The Treasurer would track the process and everything that happened along the way, and would provide the financial accounting of the budget to the City Council. The Treasurer had a very real and professional responsibility to the Council, and a very real responsibility to the organization. Mr. Bowers explained that Scottsdale received a Triple, Triple A bond rating - uninsured, which is as good as it can get. Mr. Bowers said this rating was, in effect, saying that experts in the financial field felt the way Scottsdale did business in the financial world was top notch – like blue chip, guaranteed stock.

Susan Bitter Smith asked Mr. Bowers if, in his opinion, the Council passes the ordinance at tomorrow's Council meeting, it would require a change in the City Charter. Mr. Bowers replied yes, because, in his opinion, what is happening now is a clear violation of the Charter. He thinks the Task Force will wrestle with legitimizing what has already been done, knowing clearly that it ought to be rethought. Mr. Bowers explained that professional city managers are bound by their own code of ethics to stand tall on issues of principal and be willing to lose their jobs for those principals. Mr. Bowers stated that those principals do not permit managers to do anything unethical, immoral or, in their opinion, illegal. Mr. Bowers said John Little thought long and hard before he took a stand to say he could not enable the Council to move forward with this treasurer job with his support because he didn't think it was consistent with the Charter. Mr. Bowers believes what has been done is illegal. Mr. Bowers concluded by saying that the Task Force now faces this problem. He hopes the Task Force will consider not just the issue at hand, but the whole issue of governance in the fair City of Scottsdale and the needed balance of power and constant dynamic tension that helps great things become greater.

Chairman Twist asked Sherry Scott if the new office of the treasurer has been deemed consistent with the Charter by the City Attorney's Office. Ms. Scott responded that a member of her office had signed the ordinances coming forward. Chairman Twist asked about the significance of the attorney's signature. Ms. Scott explained that when ordinances are signed by the City Attorney's office, it means that the City has determined that it is legal. Ms. Scott acknowledged that their original opinion had been that the job description of the City Treasurer was inconsistent with the City Charter because it removed necessary employees from under the direction and supervision of the City Manager. She advised that the City Manager needs to perform his charter assignments, such as preparing and administering the budget, lease agreements, franchise agreements, contracts and revenue projections, and needs the employees required to perform these duties. Ms. Scott explained that in the ordinance that will be coming forward to Council, many of those employees will be under the direction of the City Treasurer. However, the City Manager will have access and control over those employees to the extent that he needs them to perform his Charter assignments. Ms. Scott said with that added language and provision, there is no violation of language in the Charter. She noted existing case law that supports that the city manager needs to have access and control over employees to do his Charter assignments.

Susan Bitter Smith asked Sherry Scott if she feels the City's Charter will require a change if the Council adopts the proposed ordinances tomorrow night. Ms. Scott replied that she is uncomfortable recommending a charter change to the Task Force. Ms. Scott

believes that this is a policy decision for the Task Force and the Council to consider. Ms. Scott said if the members decide the Charter needs to be further clarified to resolve some of the controversy, issues or roles, an amendment would be appropriate. However, if the members are comfortable with the Charter the way it is, the members can move forward as well.

Susan Bitter Smith believes this policy question is not one that the Task Force should be deciding, and clarified that she is asking a process question more than a policy question. Ms. Bitter Smith stated that it would be useful to ask the Council what the Task Force should look at and what any additional language might be. Ms. Bitter Smith asked if there was a way this request could be communicated to them.

Chairman Twist noted that the Council has moved pretty far down the road with this ordinance. Chairman Twist explained that whether there might be a violation of the Charter in the future will be decided by a set of facts that no one on the Task Force can predict. Sherry Scott agreed with Chairman Twist's summary of the issue.

Charlie Smith questioned how Ms. Scott reconciled the two opinions regarding the treasurer's job description. Mr. Scott explained that the newly revised ordinance for the new Financial Services Department includes catchall language giving the City Manager control over the Financial Service employees required to accomplish his Charter duties.

Chairman Twist asked if any other Charter officers wanted to address the Task Force.

Sharron Walker, City Auditor, stated that her intention was to be present to answer any questions the Task Force may have regarding the materials she presented for their agenda packets. Ms. Walker noted that the City Manager is appointed by the same City Council that appoints the City Auditor and the City Treasurer. She was hired through a public recruitment and selection process, which is why she takes a little offense at being labeled a political appointee. Ms. Walker pointed out that she is a Certified Public Accountant and a Certified Fraud Examiner and also has professional ethics to follow, and has done so throughout her career.

Judge Morgan, Presiding Court Judge for the City, stated that he was here to clarify or answer any questions the Task Force may have.

There was discussion on the length of terms for Judges, Associate Judges, and Pro Tem Judges. Brent Stockwell addressed the need to add language to the Charter, which would allow the Council to appoint Associate Judges.

David Ellison, Acting City Manager, assured the Task Force that the City's Charter is working and the succession plan and a business continuity plan are in action and in effect. Mr. Ellison said staff will continue to stand tall professionally. He added that he has nearly 30 years of experience as an assistant city manager, which is a Chief Operating Officer (COO) equivalent, in cities in Arizona, Texas and Minnesota. Mr. Ellison thanked the staff for their excellent work in supporting the Task Force, and offered his assistance, as well.

Carolyn Jagger, City Clerk, noted that she is at the members' disposal until they complete this task, and had nothing to add at this time. She noted that all of her comments had been provided to the members in writing, prior to this meeting.

3. Review, discuss, and possibly amend draft agenda for November 16, 2009 meeting

The Task Force agreed that the order of the topics for the next meeting would be:

- Public comment
- Presentation from Brent Stockwell on what other cities do
- Consideration of various articles in which the City Council appointees are found, and determine if there is interest in making amendments to those provisions
- Consideration of the district issue

Brent Stockwell asked for direction from the Task Force on what they would like brought back for the next meeting.

Charlie Smith would like to discuss the residency requirement and its effect on each of the charter officer positions. Mr. Smith offered that there may be some model language from the national civic league to consider. He asked staff to research this in preparation for dealing with this issue at the next meeting.

Chairman Twist asked members to use the next two weeks to think about their positions on the issue. He encouraged members to provide staff with any language proposals they might have.

Alan Kaufman stressed the importance of consistency, and that charter officers should be defined equally in the charter. He noted that the current patchwork mention of charter officers is confusing to citizens, and recommended an effort to maintain consistency whenever possible.

Chairman Twist offered to sit down with Brent Stockwell, Sherry Scott, and Carolyn Jagger to research other city charters and determine if there is language to address all of the charter officers in one article. Chairman Twist said the group will look for charter language that would address the residency requirement and specific duties, as well.

Jim Derouin believes that another matrix for decision-making would be helpful to the Task Force. Mr. Derouin gave an example of creating a matrix that would include charter provisions that show who the officer reports to, noting that several officer positions state that they serve at the pleasure of the council, but does not say to whom they report. Mr. Derouin asked for clarification regarding an earlier statement regarding political appointees. Sherry Scott confirmed that all charter officers are political appointees.

Charlie Smith stated that he would like to go through the chart he prepared on what the ten largest cities in Arizona do in this area, noting that Brent Stockwell is fully prepared to discuss the chart when the Task Force is ready.

Jim Derouin clarified the questions for the matrix he had in mind. The matrix should include who appoints the charter officer, to whom they report, whether they serve at the pleasure of the council, and if there should be a residency requirement. Mr. Derouin stated that once these questions are answered, the words would follow.

With no further business to discuss, the meeting was adjourned at 8:13 P.M.

SUBMITTED BY:

REVIEWED BY:

Linda Pellegrini
Administrative Secretary

Brent Stockwell
Senior Advisor

Officially approved by the Charter Review Task Force on November 16, 2009
As revised on November 13, 2009